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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-452

THE BOEING COMPANY and THOMAS R. WILCOX,

Petitioners,

—against—

WILLIAM R. VAN GEMERT, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1975

No. 75-452

The Boeing Company and Thomas R. Wilcox,

Petitioners,

—against—

William R. Van Gemert, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Question Presented

Should this Court review a decision based upon settled state common law principles?

Statement of the Case

This is a class action involving a call by The Boeing Company ("Boeing") of convertible debentures listed on the New York Stock Exchange (the "Exchange"). The action was brought on behalf of debenture holders who did not receive notice of the call and, as a result, failed to convert their debentures into common stock of Boeing. Because the amount paid upon redemption was much less than the value of the stock issuable upon conversion, those holders who did not convert, because they did not receive notice, incurred substantial damages.

The call of debentures was made by the publication of a formal notice in newspapers as provided for in the indenture applicable to the debentures. The indenture was held in the vault of the Chase Manhattan Bank, the indenture trustee. A large number of the debenture holders did not see the notice and failed to convert before the cut-off date.

While Boeing may have complied with the formal notice requirements of the indenture, it did not: (a) comply with the rules of the Exchange and with its listing agreement (the "Listing Agreement"),* (b) advise the debenture holders on the debenture itself as to the form of notice they would be given upon a call, and (c) provide the debenture holders with adequate notice of the call. Since the redemption price of the debentures was approximately ⅓ of the value of the shares issuable upon conversion, the debenture holders who lost their right to convert, because of

* Boeing argued in the lower courts that it complied; in this petition Boeing finally admits it failed to comply (Petitioners brief, p. 7).

the inadequate notice, suffered a loss of approximately two thirds of the value of their Boeing securities.

A. *Boeing's Violation of the Exchange Rules and Listing Agreement.*

The Listing Agreement requires Boeing to *immediately publicize* any actions it takes regarding the "rights or benefits pertaining to the ownership of its securities". Section A10 of the Exchange's Manual ("Section A10") states that a publication pursuant to the listing agreement requires the issuance of a "general news release" and expressly states *"a formal notice or advertisement of redemption sometimes required by provisions of an indenture" is insufficient.*

Instead of issuing an immediate general news release containing the dates of the call and of the cut-off of conversion privileges, as required by the Listing Agreement and Section A10, Boeing did not issue such a release until weeks after Boeing had set the dates for the call, and only a few days before the cut-off date. Boeing made no effort to comply with the Exchange rules, but satisfied itself with two publications of formal small print advertisements of redemption in accordance with the terms of the indenture, even though the Exchange rules expressly provide that such advertisement is not adequate notice.

B. *The Debentures Did Not Apprise the Debenture Holders as to the Type of Notice They Would Receive.*

Although the indenture provided that holders of unregistered debentures would receive notice of redemption only by publication in several newspapers of a formal notice of redemption, the debentures themselves contained no de-

scription of the manner in which notice would be given. The debentures merely stated that they were subject to redemption as follows:

> "The debentures are subject to redemption, as a whole or in part, at any time or times, at the option of the company, in not less than 30 nor more than 90 days' prior notice, as provided in the Indenture . . . ".

Therefore, from the face of the debenture, the debenture holder was advised only that he would be given notice of the call. He was not advised that under the indenture such notice was nothing more than a formal publication which might not be adequate to apprise him of the expiration of his conversion privileges.

C. *The Notice of the Redemption Given by Boeing Was Inadequate.*

The published notice of the call was not adequate to reach the debenture holders. If any debenture holder received notice of the call he would have converted, since it was in his economic interest to do so. Boeing could have taken reasonable measures calculated to advise debenture holders of their rights. It could have issued an immediate general news release, as dictated by the Exchange rules; published additional notices of the call; enclosed notice of the call in proxy materials which were being distributed to the shareholders at the time; and obtained the names of debenture holders from collecting banks which had coupons showing the names of debenture holders receiving interest.

Boeing chose not to take any of the above described steps, or any other steps designed to realistically bring home notice of the call. Instead, Boeing chose the minimal pro-

cedures set forth in the indenture, ignoring its Listing Agreement and the Exchange rules designed specifically to prevent the damage done by a mere formal newspaper notice. As could be expected, a significant portion of the debenture holders never received notice of the call and, therefore, did not convert.

The Court of Appeals clearly recognized that on the specific facts and circumstances of *this* case, the notice of redemption given by Boeing was not only unfair but violated long established state common law. This careful limiting by the Court of Appeals of the scope and reach of its decision assured that its decision would be limited to the particular facts of this case.

D. *Prior Proceedings.*

The instant action is a consolidation of eight different actions pursuant to the order of the District Court. The complaint in the consolidated action was filed on June 23, 1966, more than nine years ago. Since that time, the parties engaged in extensive discovery proceedings, arrived at a comprehensive stipulation as to most of the relevant facts, engaged in a trial, and argued the appeal before the United States Court of Appeals for the Second Circuit (the "Court of Appeals"). The extensive prior proceedings are relevant to questions of whether the Court of Appeals abused its discretion in exercising pendent jurisdiction.

ARGUMENT

POINT I

In Arguing That the Court of Appeals Exercised Pendent Jurisdiction on the Basis of Only a "Colorable" Claim, Boeing Grossly Misstated the Court's Decision. An Accurate Statement of the Decision Reveals That the Court of Appeals Merely Applied the Usual Standards in Exercising Pendent Jurisdiction.

Boeing appears to be arguing that *certiorari* should be granted because the Court of Appeals established a new standard for the exercise of pendent jurisdiction, i.e., the federal claim need be no more than "colorable". However, this contention is grossly incorrect and flies in the face of both the record below and the decision of the Court of Appeals.

The federal claim upon which the Court of Appeals based jurisdiction is that Boeing incurred civil liability for its violations of the Exchange rules because such rules are an extension of the Securities Exchange Act of 1934, as amended, and an integral part of the statutory scheme under which stock exchanges are required to adopt rules. Boeing claims that the Court of Appeals held that no such cause of action exists but that the cause of action is "colorable" and, therefore, sufficient to give rise to pendent jurisdiction. However, Boeing argues, this Court's decision in *United Mine Workers* v. *Gibbs,* 383 U.S. 175 (1966) requires a *substantial* claim for pendent jurisdiction, rather than merely a "colorable" claim and, therefore, the Second Circuit expanded the concept of pendent jurisdiction in a manner which should be reviewed by this Court.

Boeing's argument is based upon a gross misstatement of the Court of Appeals' decision. The Court did *not* state that no federal cause of action exists under federal law so that the federal claim is *merely* "colorable". To the contrary, after reviewing the cases on the issue, the Court of Appeals stated:

> "Nevertheless, we do not now take the position that appellee's advance and the court below apparently accepted, that violation of an Exchange rule cannot under any circumstances give rise to civil liability under the Federal Acts. *Such a position would be in conflict with our own recent statements on the subject as well as some of the developing case law.*" (16a)* (Emphasis added)

The Court then proceeded to rebut Boeing's arguments regarding civil liability for violation of Exchange rules, by setting forth the merits of the federal claim, and concluded, citing *United Mine Workers* v. *Gibbs, supra*:

> "The claim for relief is sufficient for jurisdictional purposes *in any event.*" (Emphasis added) (19a)

From the foregoing, it is seen that the Court of Appeals did not state that there was no valid federal claim and *merely* a "colorable" one, but analyzed the substantial merit of the federal claim and concluded that such claim was "in any event" sufficient to give rise to pendent jurisdiction under the doctrine of the *Gibbs* case, *supra.* When the Court stated, at the beginning of its discussion on the federal claim, that the federal claim was "colorable", it did not say that the claim was *no more* than "colorable".

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* References are to the appendix to the Petition.

Taken in the context of its (1) favorable lengthy analysis of the federal claim following its use of the word "colorable", (2) citation of the *Gibbs* case, and (3) conclusion that the claim is *"sufficient for jurisdictional purposes in any event,"* the Court clearly indicated that the claim is considerably more than merely "colorable" and is sufficiently "substantial" for jurisdictional purposes under the *Gibbs* case. *Since the Court decided the case on basic common law principles, it was not necessary for the Court to decide the case on the basis of this federal claim.*

From the foregoing, it is clear that no new standard of pendent jurisdiction has been advanced by the Court of Appeals and, therefore, there is no reason for this Court to grant *certiorari.*

In the instant action, more than nine years have passed since the action was commenced. A trial has been held. An appeal has been decided. Under these circumstances the exercise of pendent jurisdiction was clearly appropriate. Discretion in favor of pendent jurisdiction should be exercised after substantial time and energy have been expended by the parties and the courts. *Rosado* v. *Wyman,* 397 U.S. 397 (1970). To fail to exercise pendent jurisdiction at this time, and remand the plaintiffs to a state court would waste all of the efforts of the parties and courts over the past nine years on this matter, create statute of limitations problems for the plaintiffs, and "defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation". *Rosado* v. *Wyman, supra,* at 405.

POINT II

The Decision of the Court of Appeals Requiring the Notice to Be Adequate, Regardless of Whether Boeing Complied With the Indenture, Is Not at Odds With State Law. The Court Merely Applied State Law in Reaching Such Decision.

Boeing contends that the Court of Appeals "implied a new duty of reasonable notice owed by Boeing to its debenture holders contrary to the express language of the Indenture", and in so holding created a new right which is "substantially at odds with all prior court decisions on this issue and with the law of New York State, the substantive law of which governed the Indenture by virtue of a choice of law clause." (Petitioners Brief, p. 17)

In arguing that the requirement that notice be reasonable is at odds with prior court decisions, Boeing has cited a number of cases including *Abramson* v. *Burroughs Corp.* [1971-1972 Transfer Binder], CCH Fed. Sec. L. Rep. ¶93,456 (S.D.N.Y. 1972). However, in those cases the courts either expressly found that the notices were reasonable under the circumstances therein or did not find that the notices were unreasonable, and gave no indication that compliance with provisions for unreasonable notice would have been sufficient. Indeed, in the *Abramson* case, *supra,* the court expressly refuted Boeing's contention by stating, "An investor may assume, of course, that he will receive 'reasonable' notice from the company regarding redemption." Moreover, the *Abramson* case was cited by the Court of Appeals in reaching its holding and a member of the panel (Judge Lumbard) decided the *Abramson* case while he was sitting as trial judge. Boeing has no support

for its position that the Court of Appeals holding is "at substantial odds with the prior court decisions on this issue and with the law of New York State", and has provided no reason for the granting of *certiorari.*

The decision is not at odds with the common law of New York State.

New York Courts have long held that the terms of an indenture, incorporated merely by reference in the debenture, are to be ignored when inconsistent with the terms on the face of the debenture. *General Investment Co.* v. *Interborough R.T. Co.,* 200 App. Div. 794 (1922), *aff'd* 235 N.Y. 133 (1923); *Lubin* v. *Press Steel Car Co.,* 146 Misc. 462 (City Court of New York, Kings County, 1933); *Berman* v. *Consolidated Nevada-Utah Corp.,* 132 Misc. 462 (Sup. Ct. N.Y. Co., 1923). In each of the above cited cases, the indenture was incorporated by reference in the debenture and contained provisions that the indenture trustees were to be notified before suit was brought on the debenture. These notice provisions were held unenforceable as being inconsistent with an unconditional promise to pay contained in the debentures.

Terms of an indenture are deemed inconsistent with the debenture, and thus to be ignored, if the debenture does not provide *reasonable* notice to the debenture holder that the indenture contains a limitation on his rights. This was clearly stated in the analysis by the court in the *Lubin* case, *supra,* as follows:

> ". . . it was the duty of the defendant to place the holders of said bonds *reasonably* on notice. As to the provisions in the indenture inconsistent with the provisions of the bond . . . it was the duty of the defendant to have inserted such restrictions, conditions and limitations on the *face* of the bond or by language *reasonably* clear therein contained to indicate the nature and existence of such conditions and limitations as contained in said indenture. In the absence of such limitation being contained in the bond, . . . the purchaser and subsequent purchasers thereof cannot *reasonably be held to have due notice* of such limitations or restrictions." (146 Misc. 462 at 465) (Emphasis added)

A crucial right of the Boeing debenture holders was their right to convert. Subjecting such rights to termination upon inadequate notice, clearly consisted of a limitation upon the rights of the debenture holders. However, contrary to the requirements of the *Lubin* case, the debenture did not advise the holders of this limitation on their rights, i.e., that the indenture provided for redemption upon inadequate notice. The debentures merely stated that they were subject to redemption upon thirty to ninety days' notice, and referred the debenture holders to the indenture for the specifics of the manner in which they would be put on notice. Nothing on the face of the debenture advised that the debenture holder might not receive notice because the steps taken to do so would be inadequate. Therefore, under the above cited New York cases, the provisions for inadequate notice in the indenture are deemed inconsistent with the debenture and not controlling.

The inconsistency between the debenture and the provision for inadequate notice in the indenture also arises from the inherent definition and purpose of the word "notice". The word "notice" by definition means *adequate* notice.

Under New York law, a person is placed on notice of an event only when he obtains knowledge which should put a reasonable person upon inquiry. See *Acer* v. *Westcott*, 46 N.Y. 384 (1871). Analogously, the Uniform Commercial Code adopted in New York states:

> "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be *reasonably* required to inform the other in ordinary course . . ." U.C.C. §1-201 (26) (Emphasis added)

If steps taken are not adequate or reasonably designed to put a person on notice, such person simply has not been given notice. Thus, by providing for inadequate notice, the indenture is inconsistent with the provision for notice contained in the debenture (i.e., adequate notice, by definition) and was properly ignored by the Court.

From the above, it is seen that there is nothing novel in the Court of Appeals' conclusion that the provision for the notice of redemption, as it appeared in the debenture, calls for fair and adequate notice. The Court based its holding on the fact that nothing on the face of the debenture advised the debenture holders that the notice provided in the indenture would not be adequate, because the debenture simply stated that there would be 30 to 90 days notice without setting forth the manner of such notice (20a-21a). The Court simply applied deep rooted common law principles.

CONCLUSION

The Court of Appeals' decision is based upon common law principles and raises no federal or novel questions. This court should therefore not exercise its discretion to review the case by granting *certiorari.*

Respectfully submitted,

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